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Public Prosecutor v Zahra Ahmadvand Aliakbar

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(LB)-249–04 OF 2018
KAMARDIN HASHIM, MOHAMAD ZABIDIN AND RAVINTHRAN PARAMAGURU JJCA
11 DECEMBER 2019

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Criminal Procedure — Defence — Innocent carrier — Whether accused charged with trafficking in dangerous drugs had no knowledge about drugs in secret compartment of luggage bag she lugged at airport — Whether circumstances showed accused merely helping sister (who was carrying another bag) transport the bag — Whether both bags were obtained and packed with their belongings by the sister — Whether accused's sister checked in both bags under her name before they flew to Malaysia — Whether accused's sister's cautioned statement to police absolving accused of any knowledge of the drugs consistent with accused's own defence and cautioned statement — Whether accused's conduct of looking shocked and of scolding sister when police recovered the drugs from bags relevant to show accused had no knowledge about drugs — Whether accused not guilty of 'wilful blindness' — Whether her mere act of transporting bag without mens rea possession accompanied by some overt act insufficient to constitute 'trafficking' under the law

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The respondent ('Zahra') and her elder sister, Fatemeh, were Iranians. Zahra agreed to Fatemeh's suggestion that they both come to Malaysia for a holiday. For the purpose of the trip, Fatemeh brought home two luggage bags to pack their clothes and other belongings in. Fatemeh did all the packing both for herself and Zahra, paid for their flight tickets and checked in both the bags under her name at the airport in Iran before flying to Malaysia. After collecting the bags from the carousel on their arrival at the Kuala Lumpur International Airport and while they were lugging the bags to the baggage screening area, they were stopped by police officers on surveillance duty. The officers ordered the sisters to have their bags scanned but nothing suspicious was found. Nevertheless, the officers instructed the sisters to follow them with the bags to the airport narcotics office where a thorough checking of the bags revealed that they each one had a secret compartment containing plastic packages that contained a white crystalline substance that found to be methamphetamine. From the bag that Zahra was lugging, 1,465.5g of methamphetamine was recovered while the bag that Fatemeh was carrying contained 1,445.1g of the drug. The sisters were separately charged before the same High Court judge with trafficking in the methamphetamine. At the close of the prosecution's case, Fatemeh's defence was called and at the end of her trial she was found guilty, convicted and sentenced to death under s 39B(2) of the Dangerous

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Drugs Act 1952 ('the DDA'). Zahra, however, was acquitted at the end of the prosecution's case. On the prosecution's appeal, the Court of Appeal ('the COA'), relying upon the presumption of possession and knowledge under s 37(d) of the DDA, ordered Zahra's defence to be called. After hearing the defence, the trial judge found that the prosecution had not proven its case beyond reasonable doubt and acquitted and discharged Zahra. The instant appeal against that decision was on the sole ground that the trial judge erred in ruling that Zahra was an innocent carrier. The trial judge had found that Zahra had no knowledge about the drugs and that the mere fact she was lugging a bag that contained the drugs — without mens rea possession accompanied by some overt act — was by itself insufficient to constitute the offence of trafficking under the law. The trial judge ruled that Zahra had rebutted on balance of probabilities the presumption of mens rea possession invoked by the COA. In acquitting and discharging Zahra, the trial judge found that: (a) Fatemeh's testimony in court and her cautioned statement were consistent with Zahra's defence and Zahra's cautioned statement; (b) Zahra could not be accused of 'wilful blindness' because there was no cause for her to know or suspect that the bag she was lugging at the airport contained dangerous drugs; (c) her defence was not a mere denial or afterthought; and (d) her conduct of looking shocked and of scolding Fatemeh when the police recovered the drugs from the bags was relevant in showing that she had no knowledge about the drugs.

Held, dismissing the appeal and affirming the respondent's acquittal:

(1) There was no merit in the prosecution's appeal. This court agreed with the findings of the trial judge that the respondent had successfully raised a reasonable doubt in the prosecution's case. The trial judge had considered all the evidence adduced before him and had decided based on fact and law that the prosecution had failed to prove its case beyond reasonable doubt. When the findings of the trial judge were primarily factual, it was trite that an appellate court should be slow to intervene with such findings of fact (see paras 46 & 48).

[Bahasa Malaysia summary

Responden ('Zahra') dan kakaknya, Fatemeh, adalah warganegara Iran. Zahra bersetuju dengan cadangan Fatemeh bahawa kedua-duanya datang ke Malaysia untuk bercuti. Untuk tujuan perjalanan, Fatemeh membawa dua beg bagasi untuk membungkus pakaian dan barang-barang lain. Fatemeh melakukan semua pembungkusan untuk dirinya sendiri dan Zahra, membayar tiket penerbangan mereka dan memeriksa kedua-dua beg di bawah namanya di lapangan terbang di Iran sebelum terbang ke Malaysia. Selepas mengutip beg dari karusel pada ketibaan mereka di Lapangan Terbang Antarabangsa Kuala Lumpur dan ketika mereka menyeret beg ke kawasan pemeriksaan bagasi, mereka dihentikan oleh pegawai polis yang melakukan tugas pengawasan. Pegawai-pegawai mengarahkan adik-beradik itu untuk mengimbas beg mereka

tetapi tiada apa yang mencurigakan ditemui. Walau bagaimanapun, pegawai-pegawai mengarahkan adik-beradik itu untuk mengikuti mereka dengan beg ke pejabat narkotik lapangan terbang di mana pemeriksaan menyeluruh beg itu mendedahkan bahawa masing-masing mempunyai petak rahsia yang mengandungi paket plastik yang mengandungi bahan kristal putih yang merupakan methamphetamine. Daripada beg yang dibawa Zahra, 1,465.5g methamphetamine telah ditemui manakala beg Fatemeh mengandungi 1,445.1g dadah tersebut. Adik-beradik itu didakwa secara berasingan di hadapan hakim Mahkamah Tinggi yang sama dengan pengedaran methamphetamine. Pada akhir kes pendakwaan, pembelaan Fatemeh diarahkan dan pada akhir perbicaraannya dia didapati bersalah, disabitkan dan dihukum mati di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('Akta'). Walau bagaimanapun, Zahra dibebaskan pada akhir kes pendakwaan. Dengan rayuan pihak pendakwaan, Mahkamah Rayuan ('MR'), bergantung pada anggapan pemilikan dan pengetahuan di bawah s 37(d) Akta, mengarahkan pembelaan Zahra. Selepas mendengar pembelaan, hakim bicara mendapati pendakwaan tidak membuktikan kesnya melampaui keraguan munasabah dan membebaskan dan melepaskan Zahra. Rayuan ini terhadap keputusan itu adalah atas alasan bahawa hakim bicara terkhilaf dalam memutuskan bahawa Zahra adalah pembawa tidak bersalah. Hakim bicara mendapati bahawa Zahra tidak mengetahui tentang dadah tersebut dan fakta bahawa dia sedang membawa beg yang mengandungi dadah — tanpa mens rea milikan yang disertai dengan tindakan terang-terangan — dengan sendirinya tidak mencukupi untuk membentuk kesalahan pengedaran di bawah undang-undang. Hakim bicara memutuskan bahawa Zahra telah mematahkan atas imbangan kebarangkalian anggapan mens rea pemilikan yang dibangkitkan oleh MR. Dalam membebaskan dan melepaskan Zahra, hakim bicara mendapati bahawa: (a) keterangan Fatemeh di mahkamah dan kenyataan beramarannya adalah konsisten dengan pembelaan Zahra dan kenyataan beramaran Zahra; (b) Zahra tidak dapat dituduh 'kebutaaan sengaja' kerana tidak ada sebab untuk dia mengetahui atau mengesyaki bahawa beg yang dibawanya di lapangan terbang itu mengandungi dadah berbahaya; (c) pembelaannya bukanlah semata-mata penafian atau fikiran semula; dan (d) kelakuannya yang terkejut dan memarahi Fatemeh apabila polis menemui dadah daripada beg itu berkaitan dengan menunjukkan bahawa dia tidak tahu tentang dadah tersebut.

Diputuskan, menolak rayuan dan mengesahkan pembebasan responden:

(1) Tiada merit dalam rayuan pihak pendakwaan. Mahkamah ini bersetuju dengan penemuan hakim bicara bahawa responden telah berjaya menimbulkan keraguan munasabah dalam kes pendakwaan. Hakim bicara telah menimbangkan semua bukti yang dikemukakan di hadapannya dan telah memutuskan berdasarkan fakta dan undang-undang bahawa pihak pendakwaan gagal membuktikan kesnya

melampaui keraguan munasabah. Apabila penemuan hakim bicara mengutamakan fakta, adalah mantap bahawa mahkamah rayuan perlu lambat untuk campur tangan dengan penemuan fakta (lihat perenggan 46 & 48).]

Cases referred to

Aida Dizon Garcia v PP [2015] 3 MLJ 322, CA (refd)
Amri bin Ibrahim & Anor v PP and another appeal [2017] 1 MLJ 1; [2017] 1 CLJ 617, FC (refd)
Baharudeen Mohamed Yusoff Ghaney v PP [2013] 2 MLJ 425; [2012] 1 LNS 263, CA (refd)
Chieng Chung Ting v PP [2015] 1 CLJ 765, CA (refd)
Hoh Bon Tong v PP [2010] MLJU 2184; [2010] 5 CLJ 240, CA (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Msimanga Lesaly v PP [2005] 4 MLJ 314; [2005] 1 CLJ 398, CA (refd)
Munuswamy Sundar Raj v PP [2015] 6 MLJ 214; [2016] 1 CLJ 357, FC (refd)
PP v Herlina Purnama Sari [2016] 2 MLJ 724; [2016] 1 LNS 1855, CA (refd)
PP v Mohd Zahari bin Embong [2013] 1 MLJ 201; [2012] 1 LNS 471, CA (refd)
Y Jeyamuraly a/l Yesiah v PP [2007] 5 MLJ 224; [2007] 5 CLJ 605, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), (2)

Appeal from: Criminal Trial Nos 45A-92 and 93–09 of 2014 (High Court, Shah Alam)

Faizah Mohd Salleh (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Kitson Foong (Chew Jee San with him) (Kit & Assoc) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

[1] The respondent and her elder sister, Fatemeh Ahmadvand Aliakbar ('Fatemeh') were separately charged in the High Court at Shah Alam for an offence of trafficking in dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The offence was committed on 23 August 2012 at the KLIA, Sepang.

[2] The charge against the respondent reads as follows:

> That you on 23 August 2012 at about 7.45 pm at the exit area, Level 3, MTB KLIA, Sepang, in the district of Sepang, in the state of Selangor, did traffic in a dangerous drug, to wit, 1465.5 gram Methamphetamine and that you thereby committed an

offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the same Act. A

[3] As a matter of completeness, the charge levelled at Fatemeh reads as follows: B

> That you on 23 August 2012 at about 7.45 pm at the exit area, Level 3, MTB KLIA, Sepang, in the district of Sepang, in the state of Selangor, did traffic in a dangerous drug, to wit, 1445.1 gram Methamphetamine and that you thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the same Act. C

[4] At the end of the prosecution's case, the learned High Court judge ('the learned trial judge') was satisfied on a prima facie basis that each and every ingredient of the offence under s 39B(1)(a) of the Act had been proved against Fatemeh. Accordingly, Fatemeh was called upon to enter on her defence. D

[5] However, the learned trial judge on the same prima facie basis was not satisfied that the charge had been proved against the respondent. Accordingly, the respondent was acquitted without calling her to enter her defence upon the charge. E

[6] At the end of the trial, Fatemeh was found guilty, convicted and sentenced to suffer the mandatory death penalty as mandated under s 39B(2) of the Act. F

[7] In the meantime, aggrieved with the acquittal of the respondent, the prosecution appealed to this court. The appeal was allowed by the previous panel of this court whereby the respondent was called upon to enter her defence on the said charge. G

[8] At the conclusion of the trial, the learned trial judge had again acquitted and discharged the respondent. Hence this appeal before us.

[9] We heard the appeal on 5 November 2019. After hearing the parties, we unanimously dismissed the appeal. We now give our reasons in dismissing the prosecution's appeal. H

THE PROSECUTION'S CASE

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[10] Briefly, the prosecution's case may be summarised as follows. On 23 August 2012 at about 7.45pm, ASP M Navamany ('PW3') together with Insp Kenneth Khana and a team of police officers from narcotics department attached to KLIA were on surveillance duty at the Main Terminal Building

KLIA when they detained the respondent and Fatemeh who were behaving suspiciously. They were then seen pulling one luggage bag each towards the baggage screening area.

[11] PW3 approached them and identified himself as a police officer. PW3 then instructed the respondent and Fatemeh to have their luggage scanned. PW3 did not see any suspicious image on the scanning machine. However, PW3 instructed PW4 to take both of them to narcotics office on the third floor for more detailed checking on their luggage bags.

[12] Upon checking Fatemeh's luggage bag ('P36'), PW3 discovered two transparent plastic packages ('P73' and 'P74') hidden at the bottom part of P36. Each package containing crystalline substance suspected to be dangerous drugs.

[13] From the luggage bag ('P75') which was earlier seen pulled by the respondent, PW3 discovered another two transparent plastic packages ('P76' and 'P77') hidden at the bottom part of P75. Each package containing crystalline substance suspected to be dangerous drugs similar to what was discovered from P36.

[14] The respondent and Fatemeh were then arrested and later handed over by PW3 to the investigating officer, Insp Murugan Suppiah ('PW6') together with the incriminating exhibits.

[15] PW6, subsequently sent the crystalline substance in P73, P74, P76 and P77 suspected to be dangerous drugs to the chemist, En Zulkefli bin Mohd Edin ('PW5') for analysis. PW5 later confirmed that the crystalline substance in P73 and P74 contained dangerous drugs of 1,445.1g of methamphetamine. PW5 also confirmed that the crystalline substance in P76 and P77 contained a total of 1,465.5g of methamphetamine. PW5 confirmed that methamphetamine is dangerous drugs listed under the First Schedule of the Act.

[16] As we alluded to earlier, at the end of the prosecution's case, learned trial judge had acquitted and discharged the respondent. On appeal, this court ordered the respondent to enter upon her defence on the said charge as proffered before the same learned trial judge.

THE DEFENCE CASE

[17] The respondent was the sole witness for her defence. She gave evidence on oath. Besides, the defence relied on the evidence earlier given by Fatemeh ('DW1').

[18] In her evidence, she revealed that she came from Iran. She came to Malaysia on 23 August 2012, and she was only 22 years old then. She was a law student and was financially supported by her father. Her father was doing painting business and was earning about RM4,000–RM6,000 per month.

[19] In August 2012, she was invited by her sister, Fatemeh ('DW1') to go to Malaysia for a holiday because she was mentally stressed from her eye surgery. It was DW1's idea to travel to Malaysia because DW1 had been to Malaysia and she could show her around.

[20] After she agreed to her sister's suggestion, DW1 then booked the flight to Malaysia through 'Fast Sky' on 18 August 2012. DW1 then told her that she had booked the flight to Malaysia from Erbil instead of Tehran because it was much cheaper and that they could go to Erbil first in order to celebrate Eid Al-Fitri and to visit some DW1's friends. The return flight to Erbil was scheduled on 16 October 2012 ('P41'). The holiday would not affect the respondent's studies as she was having a three month semester break. Furthermore, she was also informed by DW1 that the ticket was an open ticket, so they could change their ticket and come back to Erbil anytime they wished to.

[21] One day after Fatemeh booked their tickets, Fatemeh brought two bags home. One was green ('P36') while the other was pink ('P75'). Fatemeh then asked the respondent to bring her clothes and necessities to Fatemeh so that Fatemeh could pack for her. The respondent then followed Fatemeh's instructions and gave her all the respondent clothes and necessities. After Fatemeh packed the bag for the respondent, she opened the pink bag (P75) once and saw all her things were kept inside the pink bag.

[22] Subsequently, the respondent and Fatemeh departed to Erbil on 20 August 2012 by bus and they stayed there with Fatemeh's friend for two days. Apart from celebrating Eid Al-Fitri in Erbil, Fatemeh also asked for the respondent's passport and went to the travel agency on her own to pay for their flight tickets to Malaysia.

[23] As scheduled, the respondent and Fatemeh went to Erbil airport on 22 August 2012 in order to depart to Malaysia. Once they arrived at Erbil airport, they proceeded to the check-in counter where Fatemeh checked-in both the bags exhs P36 and P75 under her name as shown in the boarding pass for the flight EGYPTAIR MS 636 (P40(1)).

[24] They then transited in Cairo and Bangkok but their check-in bags could only be collected upon their arrival at KLIA. Upon their arrival at KLIA,

after they passed the immigration checkpoint, they proceeded to the carousel to wait for their bags.

[25] Shortly after that, their bags arrived and Fatemeh collected both the bags. The respondent suggested to put both the bags on a trolley, but Fatemeh refused and said that it would be easier to carry the bags on their own since there were only two bags. Fatemeh then asked the respondent to carry the pink bag ('P75') which she had packed the respondent's things into.

[26] After that, the respondent and Fatemeh were stopped by the police officers. They were instructed to put the bags on the scanner for inspection. The respondent followed the instruction but she was slow to put the pink bag on the conveyor belt for scanning because it was heavy and she had to lift up the bag and put in on the belt on her own.

[27] After the scan, although nothing incriminating was found, both the respondent and Fatemeh were asked to go to the inspection room for further investigations. The respondent was curious as to why they were asked to go to the inspection room although nothing incriminating was found in their bags. The respondent kept asking what happened and she spoke in Farsi that she came to Malaysia for a holiday but nobody understood her.

[28] When ASP Navamany ('PW3') arrived at the inspection room, he inspected the contents of the green bag ('P36') that was brought by Fatemeh and also Fatemeh's handbag. While PW3 was doing this, the respondent kept asking Fatemeh and the police officers what was wrong and why they were not allowed to leave, but again, nobody seemed to understand her.

[29] The police officers then tore the fabric layer of the green bag ('P36') that was pulled by Fatemeh and removed the hard cover of the bag using a screwdriver. The respondent then saw two transparent plastic packets which contained some white substance that looked like salt. The officers also tore the fabric of the pink bag ('P75') earlier pulled by the respondent and removed the hard cover with a screwdriver. Again, the respondent saw two transparent plastic packets which contained some white substance that looked like salt. The officers did not find any incriminating items in their handbags.

[30] At that point in time, the respondent was shocked. She could not believe that something was actually kept secretly below the hard cover of the bags P36 and P75. She kept asking her sister, Fatemeh how could this have happened. The respondent also kept telling the police officers that she did not know why there were packets containing white substance in the two bags. Again nobody understood her.

FINDINGS OF THE LEARNED TRIAL JUDGE AT THE END OF THE DEFENCE'S CASE

[31] The learned trial judge was of the view that the previous panel of the Court of Appeal in ordering the respondent to enter upon her defence was relying on the presumption of possession and knowledge under s 37(d) of the Act. This was upon the fact that the respondent had the pink bag P75 under her custody and control and the impugned drugs were recovered from the said bag. However, the learned trial judge took the view that the mere act of carrying the bag was not sufficient to constitute the offence of trafficking of the impugned drugs under the Act. The learned trial judge was right that to constitute trafficking, there must be mens rea possession accompanied by some overt act. Once the defence was called, the burden of proof shifted to the respondent to prove on the balance of probabilities that she was not trafficking in the impugned drugs (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631).

[32] The learned trial judge also took the view that the presumption under s 37(d) of the Act relied on by the prosecution had been successfully rebutted by the respondent on the balance of probabilities. The learned trial judge accepted the defence of the respondent that she was an innocent carrier without guilty knowledge. The learned trial judge relied on this court decision in *Aida Dizon Garcia v Public Prosecutor* [2015] 3 MLJ 322; *Baharudeen Mohamed Yusoff Ghaney v Public Prosecutor* [2013] 2 MLJ 425; [2012] 1 LNS 263 and *Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224; [2007] 5 CLJ 605.

[33] Accordingly, the learned trial judge found that the defence had raised a reasonable doubt in the prosecution's case. The prosecution had failed to prove the charge against the respondent beyond reasonable doubt. Thus, the respondent was acquitted and discharged by the learned trial judge. Hence, the appeal before us.

THE APPEAL

[34] Before us, the learned deputy public prosecutor ('learned deputy') raised one solitary ground of appeal ie the learned trial judge erred in law and fact in finding that the respondent was an innocent carrier. It was argued by the learned deputy that the learned trial judge erred in fact and law in discharging and acquitting the respondent based on the following reasons:

(a) that the impugned drugs were found under the bottom hard layer of the pink bag (P75) which could not be seen by the naked eyes and thus wilful blindness is inapplicable;

(b) that the defence of the respondent was not mere denial and not an afterthought;

(c) that the conduct of the respondent of scolding Fatemeh (DW1) after the discovery of the drugs negates the element of knowledge on the part of the respondent of the impugned drugs; and

(d) that the respondent's defence was consistent with DW1, the cautioned statements of DW1 (D131) and of the respondent (D132).

[35] The learned deputy relied heavily on cases involving defence of innocent carrier which brings in the picture the concept of wilful blindness. Much reliance was placed on the Federal Court decision in *Public Prosecutor v Herlina Purnama Sari* [2016] 2 MLJ 724; [2016] 1 LNS 1855 and *Munuswamy Sundar Raj v Public Prosecutor* [2015] 6 MLJ 214; [2016] 1 CLJ 357, and the decision of this court in *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314; [2005] 1 CLJ 398, *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240 and *Chieng Chung Ting v PP* [2015] 1 CLJ 765.

[36] In response, the learned counsel for the respondent submitted that the learned trial judge did not err in law and/or in facts in finding that the respondent had no knowledge of the impugned drugs found in the baggage in question. Learned counsel further submitted that the learned trial judge did not err in ruling that the respondent's defence was corroborated, and accepted the respondent defence of an innocent carrier.

DECISION

[37] It was not disputed that the respondent was seen pulling the bag P75 when she was stopped by PW3 at the KLIA. However the learned trial judge had made a clear findings of fact that the respondent had no knowledge whatsoever of the impugned drugs found hidden in the bottom of the bag. The bag was checked-in by Fatemeh before their departure. The bag was given to the respondent to put her belongings. The bag was given to her by Fatemeh and she had opened it only once. The respondent did not find anything unusual about the bag.

[38] The findings of fact by the learned trial judge can be seen in His Lordship written judgment from p 13 of the appeal record Vol 1:

> 13. Berdasarkan keterangan yang dikemukakan di peringkat pendakwaan sendiri telah menunjukkan bahawa tiada keterangan menunjukkan Tertuduh Pertama mempunyai pengetahuan tentang kewujudan dadah (P76 dan P77) yang disorok di dalam beg (P75) yang diberikan oleh kakaknya. Apa yang ada dalam pengetahuan Tertuduh Pertama adalah setakat beg (P75) tersebut telah diberikan oleh kakaknya

untuk menyimpan barangan peribadinya yang kemudiannya menjadi bagasi yang ditariknya semasa sampai di KLIA. Oleh kerana pendakwaan sendiri melalui saksinya telah mengesahkan kenyataan yang dinyatakan dalam percakapan beramaran Tertuduh Kedua (D132), maka Mahkamah ini membuat dapatan bahawa Tertuduh Pertama telah berjaya menolak pemakaian anggapan di bawah seksyen 37(d) ADB di peringkat kes pendakwaan dan mendapati tiada kes prima facie bahawa Tertuduh Pertama mempunyai milikan dan pengetahuan terhadap dadah tersebut (P76 dan P77) [*Chee Chiew Heong v Public Prosecutor* [1981] 2 MLJ 287]. Tambahan pula tiada keterangan lain yang dapat mengaitkan Tertuduh Pertama selain daripada mempunyai milikan fizikal ke atas bagasi (P75) tersebut. Dadah yang tersorok rapi dalam beg P75 itu tidak mungkin dapat diketahui atau disyaki oleh Tertuduh Pertama kerana beg P75 itu diberikan oleh kakaknya sendiri.

[39] The learned trial judge finding of no knowledge on the part of the respondent was due to the nature of how the impugned drugs were concealed in the manner which cannot be seen by naked eyes and even cannot be detected by the scanning machine at the KLIA. At pp 64–68 of the appeal record Vol 1, the learned trial judge had considered all the evidences before deciding that:

19. Mahkamah membuat dapatan bahawa berdasarkan keterangan pembelaan Tertuduh Pertama (SD2) dan keterangan pihak pendakwaan bahawa dadah yang ditemui di dalam beg berwarna merah jambu (P75) berada di bahagian bawah lapisan keras beg (P75) adalah tidak mungkin boleh dilihat dengan mata kasar kalau pun beg (P75) itu dibuka dan diperiksa kandungannya. Keterangan SP3 yang menyatakan terpaksa mengopak pelapik keras beg (P75) sebelum dadah tersebut boleh ditemui menunjukkan bahawa dadah tersebut telah disembunyikan dengan begitu rapi dan sukar dilihat dengan mata kasar. Oleh yang demikian, prinsip 'wilful blindness' tidak wajar terpakai di dalam kes ini. Mahkamah ini sedar penghakiman di dalam kes *Baharudeen Mohamed Yusoff Ghaney v PP* [2013] 2 MLJ 425 yang jelas menerangkan seperti berikut:

> [19] Again we are in complete agreement with the trial judge that the conduct of the accused displayed nothing short of wilful blindness towards the contents of the 31 tins inside P7. He also correctly relied on the Singapore Court of Appeal case *Zulfikar bin Mustaffah v PP* [2011] 1 SLR 633, although there are our own reported cases on the same issue. It was held in that case:
>
> > *It is thus not enough for an accused merely to assert absence of knowledge. The facts of the case must be examined as a whole to see whether he had good reason to suspect that he was carrying drugs* ... In short, *ignorance is a defence only when there is no reason for suspicion and no right and opportunity of examination; ignorance simpliciter is not enough.* (Emphasis added.)

20. Namun, dengan membezakannya dengan fakta di dalam kes ini, Mahkamah ini mendapati Tertuduh Pertama (SD2) tidak semata-mata menafikan dan menyatakan tiada pengetahuan di dalam kes ini tetapi fakta keseluruhan kes ini dapat menyokong dakwaan Tertuduh Pertama (SD2) bahawa dia tidak ada sebab untuk mengesyaki apa-apa dan dia telah memeriksa beg (P75) itu dan dia tidak mungkin boleh mempunyai pengetahuan mengenai kewujudan dadah yang

A tersembunyi tersebut walaupun dia telah membuka beg (P75) tersebut bagi memeriksa pakaian-pakaian dan barang keperluannya telah ada di dalam beg (P75) tersebut yang telah dikemas masuk oleh kakaknya sendiri (SD1). Semua perkara yang dinyatakan di dalam pembelaannya mengenai perbelanjaan percutian ke Malaysia oleh SD1 dan beg berwarna merah jambu (P75) yang digunakan semasa
B ditahan telahpun dibangkitkan semasa kes pendakwaan dan tidak boleh dikatakan sebagai rekaan terkemudian (afterthought).

21. Berdasarkan fakta dan keterangan secara keseluruhan yang ada dalam kes ini juga, adalah didapati bahawa jika pun inferens pengedaran di bawah seksyen 2 digunapakai terhadap Tertuduh Pertama (SD2) di dalam kes ini, Tertuduh Pertama
C (SD2) telah berjaya menimbulkan keraguan yang munasabah bahawa dia tidak mungkin boleh mempunyai pengetahuan mengenai dadah yang disembunyikan di bahagian bawah lapisan keras beg berwarna merah jambu (P75) tersebut dan dengan itu Tertuduh Pertama (SD2) tidak wajar didapati salah bagi pengedaran dadah itu tanpa mempunyai pengetahuan mengenainya.

D

22. Mahkamah ini merujuk kepada kes *Y Jeyamuraly Yesiah v PP* [2007] 5 CLJ 605 yang menyatakan seperti berikut:

> [54] The evidence clearly showed that the said biscuit tin which contained the said dangerous drug was in the custody and under the control of the appellant.
E This is what is termed as passive possession in several authorities. That the appellant had knowledge of the said biscuit tin has to be inferred from the circumstances as discussed earlier. *We find that the evidence showed that he had knowledge. But, to constitute trafficking under s 39(b) of the Act, there must be mens rea possession accompanied by some overt act. We find no such evidence in this instant appeal.* (Emphasis added.)

F

23. Mengenai anggapan di bawah seksyen 37(d) dan (da) Akta Dadah Berbahaya yang terpakai di sini, adalah didapati Tertuduh Pertama (SD2) telah berjaya menyangkal anggapan tersebut dengan menunjukkan melalui pembelaannya dan SD1 serta disokong pula oleh keterangan dalam kes pendakwaan sendiri bahawa dia tidak mungkin mempunyai pengetahuan mengenai kewujudan dadah tersebut atas
G imbangan kebarangkalian.

24. Di dalam situasi tersebut ditambah pula terutamanya perlakuan Tertuduh Pertama (SD2) yang marah kepada SD1 apabila mendapat tahu terdapat barang dadah di dalam beg berwarna merah jambu (P75) yang dibawa olehnya, telah menunjukkan bahawa Tertuduh Pertama (SD2) tidak ada pengetahuan mengenai
H dadah itu. Maka adalah tidak selamat untuk mensabitkannya atas pertuduhan (P2) di dalam kes ini. Oleh itu Tertuduh Pertama (SD2) dilepaskan dan dibebaskan daripada pertuduhan atau lain-lain kesalahan berkaitan dadah tersebut. Tiada pengetahuan mengenai pemilikan dadah bererti tiada sabitan boleh dibuat bagi kesalahan pemilikan ataupun pengedaran.

I

25. Selain daripada alasan-alasan yang dinyatakan di atas, Mahkamah juga telah meneliti rakaman percakapan amaran (D130) Tertuduh Kedua (SD1) serta keterangan SD1 dan mendapati ianya adalah konsisten dengan keterangan Tertuduh Pertama (SD2) bahawa Tertuduh Pertama (SD2) tidak langsung mempunyai pengetahuan mengenai dadah yang tersembunyi di dalam beg

berwarna merah jambu (P75) yang dibawa pulang oleh SD1. Pada masa ditangkap, Tertuduh Pertama (SD2) hanyalah seorang pembawa tidak bersalah (innocent carrier) dadah-dadah tersebut.

26. Mahkamah ini juga telah memberi pertimbangan kepada percakapan amaran (D131) Tertuduh Pertama (SD2) dan mendapati ianya adalah konsisten dengan keterangan SD1 (Tertuduh Kedua) dan percakapan amaran (D130) Tertuduh Kedua serta keterangan Tertuduh Pertama (SD2) di dalam kes ini.

27. Oleh kerana Tertuduh Pertama (SD2) telah berjaya menyangkal anggapan pengetahuan di bawah seksyen 37(d) ADB 1952, Mahkamah ini telah mendapati bahawa sekaligus Tertuduh Pertama (SD2) telah juga berjaya menyangkal anggapan pengedaran dadah seperti di dalam pertuduhan (P2). Tertuduh Pertama (SD2) dengan ini dilepas dan dibebaskan setelah Mahkamah ini menimbangkan keterangan di dalam perbicaraan ini.

[40] We had the opportunity in perusing the evidence relied by the learned trial judge in his findings. The bag P75 was given and checked-in by Fatemeh at the airport in Erbil under Fatemeh's own name. Fatemeh packed the respondent's belonging. This had been admitted by PW3, PW4 and PW6 in their evidence as follows:

Q: Boleh sahkan kedua-dua beg sebenarnya di'tag' atas nama Fatemeh?

A: Setuju

Q: Melalui pengalaman ASP Nava, memandangkan kedua-dua beg di'tag' dengan nama OKT2. Adakah ini konsisten dengan fakta bahawa OKT2 telah check-in beg-beg ini sebelum penerbangan sebagai beg beliau?

A: Setuju.

(PW3, arresting officer, cross-examination, pp 2 and 7, Vol 2(3), records of appeal)

Q: Boleh Inspektor sahkan kedua-dua bagasi sebenarnya ditag atas nama Fatemeh iaitu tertuduh kedua?

A: Ya.

(PW4, arresting officer, cross-examination, p 53, Vol 2(1), records of appeal)

Q: Inspektor Murugan, boleh Inspektor sahkan bahawa kedua-dua bagasi yang dibawa oleh Tertuduh sebenarnya ditag atas nama OKT2 iaitu Fatemeh?

A: Ya, YA.

...

Q: Adakah Zahra memberitahu kepada Inspektor bahawa beliau sebenarnya diajak oleh kakaknya untuk datang ke Malaysia untuk melancong?

A: Ya, YA.

A
Q: Adakah Inspektor Murugan juga bersetuju bahawa sebelum penerbangan mereka ke Malaysia, kakaknya, Fatemeh telah membawa balik 2 bagasi iaitu bagasi merah jambu dan bagasi berwarna hijau?
A: Setuju, YA.
Q: Berdasarkan perakaman dalam percakapan ini, ini bermakna bahawa bagasi berwarna merah jambu telah diberikan oleh kakaknya, Fatemeh?
B
A: Ikut percakapan, YA.
...
Q: Adakah Inspektor Murugan mengetahui bahawa sebenarnya kakaknya, Fatemeh yang tolong adiknya, Zahra untuk mengemas dan meletakkan semua barang-barang peribadi dalam bagasi warna merah jambu?
C
A: Ya, YA, mengikut statement rakaman percakapan beramaran OKT1.

(PW6, investigating officer, cross-examination, pp 91–92, Vol 2(2), records of appeal)
D

[41] The learned trial judge also relied on the evidence that the impugned drugs were very well concealed and cannot be detected by naked eyes and not even by scanning machine. Such material fact can be found in the evidence of
E PW3 and PW4 as follows:

Q: Adakah ASP Nava setuju dengan saya peket-peket ini telah disembunyikan dengan agak rapi?
A: Setuju
F Q: Bila kamu buka beg ini dan kosongkan isi dia semua, boleh kamu lihat dadah?
A: Tidak.
Q: Bila kamu koyak pelapik kain masih tidak dapat lihat?
A: Setuju.
G Q: Hanya lepas ASP Nava kopakkan pelapik keras dan keluarkan, baru boleh lihat peket dadah?
A: Setuju
Q: Jadi saya cadangkan pada ASP Nava, ada kemungkinan OKT1 tidak tahu apa sebenarnya tersorok di bawah pelapik keras?
H A: Setuju.
Q: Adakah ASP Nava setuju penggunaan pelapik keras menyebabkan satu keadaan lebih susah untuk melihat apa yang di bawahnya?
A: Setuju.
...
I Q: Setuju dalam kes ini dadah disembunyikan dalam special compartment dalam keadaan rapi?
A: Setuju.
Q: Secara luarannya dan juga apabila dibuka nampak seperti beg biasa, normal sahaja.

A: Setuju.

...

Q: ASP setuju dengan cadangan bahawa kemungkinan OKT-OKT ini tidak tahu apa sebenarnya yang tersorok bawah pelapik keras ini. Boleh jelaskan?

A: Saya setuju dengan ada kemungkinan tertuduh tidak tahu kandungan yang tersorok di dalam beg tersebut adalah kerana dadah tersebut dibungkus secara rapi dan padat dan susah untuk orang biasa untuk mengetahui perbezaan antara beg kosong dengan beg yang ada dadah tersembunyi.

...

Q: Semasa imbasan, apa yang berlaku?

A: Semasa imbasan, tiada imej yang mencurigakan di dalam kedua-dua beg besar.

(PW3, arresting officer, examination-in-chief, pp 5–6, 12 and 18, Vol 2(1), records of appeal)

Q: Semasa beg dibuka, mula-mula kami boleh lihat ada lapisan kain dalam beg tersebut?

A: Ya.

Q: Dan lepas kita koyakkan lapisan kain, kita ada nampak lapisan keras?

A: Hard case, ya.

Q: Dan di bawah lapisan keras itu, terdapat dua penarik, besi penarik, penarik beg di bawah lapisan keras.

A: Ya.

Q: Dan barang kes iaitu dadah, sebenarnya dijumpai di bawah penarik?

A: Ya.

Q: Dan barang kes iaitu dadah, sebenarnya dijumpai di bawah penarik?

A: Ya, di bawah penarik beg.

Q: Adakah Inspektor setuju bahawa semasa kami membuka beg warna merah jambu, Inspektor hanya boleh lihat pakaian wanita dan barang kegunaan harian wanita sahaja, betul?

A: Saya nampak, saya identify barang kes, tapi berkenaan dengan pakaian-pakaian, saya tak pasti itu pakaian wanita, saya tak ingat.

Q: Jadi nampak pakaian dan barang kegunaan harian?

A: Ya.

...

Q: Adakah Inspektor sahkan semasa pengimbasan, tiada imej yang mencurigakan dilihat?

A: Tiada imej yang mencurigakan.

(PW4, arresting officer, cross-examination pp 50 and 55, Vol 2(1), records of appeal)

[42] The learned trial judge further relied on the conduct of the respondent

consistent with an ordinary and innocent person. She gave the police her full cooperation. Again, the testimonies of PW3, PW4 and PW6 proved these.

(a) the evidence of PW3:

Q: Bila mereka diminta untuk menunjukkan dokumen pengenalan, adakah mereka menurut arahan?

A: Menurut arahan.

Q: Rujuk P104 — police report. Adakah ASP Nava setuju dalam laporan ini, ASP Nava telah menyatakan telah menahan dua perempuan tetapi tidak ada apa-apa bahawa mereka ditahan kerana mereka mencurigakan?

A: Setuju.

Q: Adakah OKT1 menurut kesemua arahan yang diberi kepada beliau secara sukarela?

A: Ada.

...

Q: Dari keterangan ASP Nava, adakah ASP Nava setuju dalam bilik, OKT1 mengikut arahan buka beg tanpa apa-apa masalah?

A: Setuju.

Q: Beliau juga tidak buat apa-apa percubaan untuk lari dan sebagainya?

A: Setuju.

...

Q: Kalau saya lihat keterangan ASP Nava secara keseluruhan, nampaknya tidak ada apa-apa kelakuan yang mencurigakan yang menyebabkan OKT1 ditahan?

A: Setuju.

(b) PW4 under cross-examination said:

Q: Adakah kedua-dua tertuduh bekerjasama apabila mereka disuruh untuk membuat pengimbasan?

A: Ya.

Q: Adakah tertuduh pertama meletakkan beg beliau di dalam mesin pengimbas dengan sendiri?

A: Ya, dengan sendiri.

...

Q: Inspektor tadi memberitahu kepada Mahkamah bahawa reaksi tertuduh pertama yang menunjukkan reaksi yang cemas semasa Inspektor Navamany menjumpai barang kes dalam bagasi warna merah jambu, betul?

A: Ya.

Q: Secara lojik, jika kami, beg kami dijumpai ada barang kes, reaksi kami pun akan cemas, betul?

A: Betul.

Q: Kalau Tuan, bila beg Tuan dijumpai dengan barang kes dadah, adakah Tuan juga akan cemas, setuju atau tak setuju?

A: Setuju YA.

Q: Jadi saya cadangkan reaksi cemas tertuduh pertama ini adalah satu reaksi biasa?

A: Setuju.

(c) the evidence of PW6:

Q: Inspektor Murugan, semasa Inspektor Navamany menyerahkan barang kes dan juga tertuduh-tertuduh kepada Inspektor, adakah Inspektor Navamany memberitahu Inspektor bahawa kedua-dua mengikut semua arahan tanpa masalah?

A: Setuju.

[43] We found that the defence of the respondent had been corroborated by the evidence of Fatemeh and the cautioned statements recorded from both of them. We highlight the relevant part of Fatemeh's (DW1's) evidence as follows:

Q: After you packed the bag for her, did she check the pink bag?

A: Yes, once she opened, and check inside and close the bag. She see her clothes inside, she closed the bag.

...

Q: Does Zahra know Ali and Arman?

A: No.

Q: In your witness statement, you mentioned that you packed Zahra's clothes and necessities into the pink bag. Did Zahra know that the pink bag was actually given to you by Arman?

A: No.

Q: After Arman gave you the 2 bags and when you brought the 2 bags back, did Zahra see the bags?

A: Yes.

Q: Did Zahra ask you where did you get the 2 bags from?

A: No, only she thought I bought these new bags. Zahra did not asked me where I got the two bags. But she was happy because she thought I bought 2 new bags.

...

Q: You also mentioned that you will talk to Zahra but not for everything. Why was it so?

A: Because Zahra is younger than me, I will not talk to her about my boyfriend and personal life; that is why I never told her so many things. In our family, we don't talk so much about the personal thing.

Q: You also mentioned that Zahra did not ask you anything about the bag, but did you tell Zahra anything about the bag?

A: No.
Q: Why didn't you tell Zahra about the bag?
A: Because the bag given to me by Arman and Ali, and I didn't want to tell my boyfriend's name to her.
...
Q: Now I am referring to the same page of the witness statement, paragraph 2. You also mentioned that when you met up with Ali and Arman, Arman gave you the 2 bags which were supposed to be returned to Morteza. Refer to P11, picture 1. Can you confirm these are the bags given to you by Arman?
A: Yes.
...
Q: You were also asked, Zahra knew that there were drugs inside the luggage, that's why Zahra asked you to cover all her things up in the pink bag, you disagree. My question is, whose idea was it for you to pack Zahra's clothes into the pink bag?
A: My idea.

[44] PW6 in his evidence confirmed that the respondent's defence was clearly supported by Fatemeh and by their cautioned statements (D131 and D132). PW6 admitted during cross-examination at pp 92–93, Vol 2(2) of the appeal record as follows:

Q: Bolehkah Inspektor Murugan mengesahkan bahawa keterangan Zahra dalam Percakapan Dalam Pemeriksaan beliau adalah konsisten di mana ia juga disokong oleh keterangan kakaknya, Fatemeh?
A: Tak faham, ulang.
J: The counsel is asking you, apa yang Zahra cakap, sama macam Fatemeh cakap dalam Percakapan Beramarannya?
A: Ya, YA.
J: Apa yang OKT1 nyatakan dalam D131 adalah sama dengan apa yang dinyatakan oleh OKT2 dalam percakapan amarannya.

[45] On the issue of knowledge, we need only to refer to the often cited case of *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 where it was decided that:

> In some of the cases it has been said that without knowledge there can be no possession. In others, *'in possession' has been read as 'knowingly in possession' by application of the doctrine of mens rea*. In some instances either view leads to the same result but not in all. The dicta does not make what degree of knowledge is meant. Also in some of the statutes, 'possession' and 'knowledge' have been treated separately and much confusion has resulted.
>
> The words 'possession' is vague and general word which cannot be closely defined. *Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.* This is recognised in the present Drugs Ordinance

which provides, *by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him* ... (Emphasis added.)

[46] We observed that the learned trial judge had considered all the evidence adduced before him and had decided based on fact and law that the prosecution had failed to prove its case beyond reasonable doubt. When the findings of the learned trial judge were primarily factual, it is trite that, an appellate court should be slow to intervene such findings of fact. This court in *Public Prosecutor v Mohd Zahari bin Embong* [2013] 1 MLJ 201; [2012] 1 LNS 471 wherein Apandi Ali, JCA said this:

[17] After hearing the respective submissions and upon perusal of the appeal records and the grounds of judgment, it is our findings that the contentions by the prosecution are primarily factual. An appellate court will be slow to disturb such findings of fact if such findings are not clearly against the weight of evidence. *It will not interfere with the findings unless such findings are perverse or obviously wrong.* (Emphasis added.)

[47] Hasan Lah, FCJ in *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1; [2017] 1 CLJ 617 had decided on the duty of trial judge at the end of a trial:

[54] At the end of a trial s 182A of the Criminal Procedure Code imposes a duty on a trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt.

[55] Whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 MLJ 263 go one step further before convicting an accused by giving due consideration as to why the defence story, though could not be believed, did not raise any reasonable doubt in the prosecution case (see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 171). This was done by the learned trial judge.

CONCLUSION

[48] For the reason stated above, we agree with the findings of the learned trial judge that the respondent had successfully raised a reasonable doubt on the prosecution's case. We did not find any merit in the appeal. The appeal was dismissed. The acquittal of the respondent by the High Court was affirmed.

Appeal dismissed; respondent's acquittal affirmed.

Reported by Ashok Kumar